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on

The Problems of Law of Torts

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STATE'S LIABLITY FOR TORTS COMMITTED BY THE EMPLOYEES OF THE STATE

By

G.K. Arora*

The law of civil liability does not so much look to the injurer as to the loss or damage of the injured (1). As such there should not have been any problem of the type (2). that we are here discussing. If anyone is injured and the law provides an action for that injury equality before law demands that one who is or who sould be responsible should without distinction be made liable to compensate. And in fact there was no difficulty in our country in fixing such liability on the executive authority also for the wrongful acts of its servants on the principle of vicarious liability(3), till the English doctrine of non-sueability of State on the principle of Crown's immunity and non-submission to law was uncritically accepted without considering whether it was valid, essential or desirable. Both the aspects of the English doctrine are repudiated by our Constitution.

Article 300 lays down three things - firstly the name in which the government may be party to a suit, thus it lays down that the State can be sued so that the doctrine of non-suability of the sovereign is rejected; secondly, it rejects the doctrine of sovereign being above alaw by empowering the legislature to lay down rights and obligations and liabilities of the government in respect of causes of action for suits brought in the courts of law; and thirdly, it lays down that till the legislature does so provide the law that has been before the Constitution, shall continue. We need not go in any detailed discussion of the provisions of that Article.

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* Lecturer in law, Lucknow University.

(1) Lambert & Olliot V Bessey, T. Raym, 421 (K.B.1681).

(2) As described in the Break up of the Working Paper at item IV - Problems of Public Tort.

(3) 2 Morley's Digest, 307 (Dhackjee Dadajee v E.I.Co.)

These provisions are discussed in all the books on Indian Constitution with its history and various decisions of the courts though largely these writings donot go any further than a compilation of the decisions and at the most indicating the lines suggested by these decisions.

No law has been passed on the subject so far by the legislature though a bill is pending before the Parliament (4). The pending bill is based on the report of Law Commission of India which was submitted in 1956. Analysing the constitutional provisions from earlist times and some of the important cases on the subject the Commission has declated clearly that the law as it stood in 1858, which in turn is declared to continue under Article 300, there existed no immunity which the Crown in England enjoyed in respect of torts committed by the servants of the Crown, for notonly the contractual obligations butall liabilities then existing and all liabilities to be incurred thereafter by the Company were chargeable on the revenues and could be enforced by suit as if the assets belonged to the Company(5). The Commission further argued that there was no justification, for drawing a distinction, as was done in some later decisions, between sovereign and non-sovereign powers of the East India Company(6). The Commission after discussing the law on the topic in England, U.S.A., Australia and France gave its own proposals for a law to be passed on the lines of Crown Proceedings Act of 1947 with certain modifications.

Retreading the same field will not serve any purpose. Therefore after making only a reference to the two conflicting decisions of the Supreme Court it is proposed to examine as to how far the proposed legislation would remove the confusion and meet the requirements of the times. Looking at the problem from a more fundamental angle it is the submission of the writer that the solution of the problem involves consideration of the nature of the State and a search for the ethical basis for the establishment of the responsibility of the State.

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(4) It is a sad commentary on the functioning of our legislature that it has remained inactive in all those fields where the Constitution laid down only interim provisions expecting the legislature to act in due course, eg. art. 105 and 194 also remain unattended. Though the Report of Law Commission was submitted in 1956, a Bill was moved only in 1965 after a Supreme Court judgment but it lapsed and the same has been now moved afresh.

(5) Law Commission of India, First Report, p.3.

(6) Ibid, p.5; 5 Mad. 273.

In 1965 the Supreme Court of India(7) through Gajendragadkar C.J., declared that the State was not liable for tortious acts of its servants where such acts were referable to the exercise of sovereign power. Where a statute confers such power on a specific authority the State cannot be liable. The judgment, it is respectfully submitted, is wholly wrong(8). It has overlooked the distinction between an Act of State and an act done purporting to be done under the authority of municipal law. Apart from the earlier decisions the Supreme Court itself had clarifed that distinction six years before (9). Soon after the Supreme Court had held the State liable(10) for the negligence of its servant in the service of the government because in similar circumstances an ordinary master would be vicariously liable. The distinction between Trading and Sovereign acts of East India Company was not recognised. Instead it was said that there is no reason why the feudal concept of 'king can do no wrong' should survive in India. Yet in 1965 Supreme Court disapproved its own earlier decision as 'going far beyond the existing law as embodied in Art.300'. Thus ironically Indian law on the subject which was much ahead of the law in England till 1947, after Independence has become tied with the old English law more or less. It is not suggested that the judiciary should have laid down the law which is the function of the legislature but at the same time it is not justified in regarding some doubtful principles assumed to have been accepted a century ago as being fixed for all times in the interpretation of law(11).

The present day irresponsibility of the State for torts of its servants is embedded in the feudal theory that the sovereign was the highest power and subject to no law. Without going into any detailed discussion of the Crown's immunity arising from the principle that the King can do no wrong, it is worth noting that this English system was not the result of the any well considered and systematic plan. Partly it is rooted in feudalism, partly it is traceable to the political theories that developed when the divine right of kings was in common acceptance, and mostly it is built up by the judicial opinion embodying those feudal concepts of the middle ages

(8) Seervai, Indian Constitution 815
(9) 1959 S.C.J.395.
(10) A.I.R. 1962 S.C. 939.
(11) Friedman, Law in a Changing Society, 492.
(12) Read Pollock & Maitland, History of English Law; Blackstone, Commentaries; Holdsworth, 38 L.Q.R.141.

in which they were trained and well engrossed. The personality of the Crown was gradually extended to emanations of the crown'(13) the predecessor, so to say of the present day 'public officer'. Needless to say these conditions donot exist today and therefore its politico-legal conclusions also should have to place today.

It is a trusim to say that the functions of the State have much increased and are constantly increasing and new departments, new boards and new public bodies keep spring into existence. But it is not fully appreciated thatthere is not only an increase in the function of the State the character of the State is also changed from the one that it possessed at the time when this rule of irresponsibility was orirignated. State had been conceived as a personification of the sovereign and the sovereign was the embodiment of power. As put by Holland (14) only the nature of power may cause any limitation over the sovereign but no law or constitution because the sover ign is the source of law and constitution. Non-suability was an attribute of person sovereign and the same was attached to the State also. Needless to say the sovereign and in turn the State cannot today be defined in terms of power alone. State is no more the personification of the sovereign noun. State today is conceived as a juristic person itself. May it not be concluded that as a juristic person the State may have some interests as such. The juristic personality is only a legal devise to secure the de facto claims of human beings(15). It is obvious therefore that there should not be any conflict between the interest of the State as such and the interest of society which means human beings comprising the society. State is in the last analysis only a political organisation of society. If we donot accept the State in this form we shall have to face the Marxian charge that State and law are only a coercive machinery.

So long the sovereignty was the quality of the sovereign noun it was obviously indivisiable. But now sovereignty is the equality of the State - a juristic person. As such sovereignty is no more indivisible. It is divisible not only as external and internal, but internally also it is divisible between various aspects and area. And increasingly parts of that sovereignty external or internal is being brought under 'law and constitution'. For exampe the traditional principle of immunity of ships owned by foreign States under their own

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(13) Law & Contemporary Problems, Vol. 9 p.184.
(14) Holland Jurisprudence.
(15) Stone, Jurisprudence.

jurisdiction is no moreuniversally reognised (16). Internally the inter-State commercial transactions are increasingly brough under private law rules of municipal jurisdiction even in the Common Law countries (17). In our country municipal jurisdiction was always recognised in respect of commercial activities of the State.

It it is accepted that the claim of immunity of State arises from the concepts of political philosophies of the feudal days, and if it is also accepted that the character of the State is now fundamentally changed(18) the only logical conclusion is to give up the pseudo-legal principle of State immunity formulated on those old political philosophies. That archaic notion is completely inconsistent with the modern tendencies in law and modern social policy(19). The concept of Rule of Law also requires that an individual or body adversly affected should be in a position to seek remedy either to a igher authority or to a court of law(20). Besides, it conflicts with the principle of legal philosophy itself(21).

It is agreed on all hands that law and morals have separate fields of operation, but legal systems grow out of moral concepts cannot be denied either. The claim of State immunity has no ethical foundation in its support. On the other hand ethical basis exists for the establishment of State responsibility. Law is not merely an instrument of goverhment in power. It is a devise to protect the weak against the strong, the subject against the ruler(22). Law of torts, ethically speaking, is the area of social obligations. Man lives amongst neighbours and therefore when he conducts his affairs he must llok out for the interests of his neighbours(23). This obligation does not make any distinction between this man and that man on the basis of office or status.

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(16) Brussels Convention of 1926. (17) 1937 A.C. 500
(18) Preamble in Indian Constitution.
(19) Harper, Law of Torts, 663.
(20) International Commission of Jurists, Bangkok Report (1965) p.63.
(21) ubi jus ibi remedium has no meaning in face of state immunity because there is no remedy even where there is a right.
(22) Meaning of Freedom, p.10.
(23) Lord Atkin's definition and duty of a neighbour in 1932 A.C.562.

Law of torts essentially asserts and protects a right and consequently provides damages if that right is infringed. So that even if in the 19th century law of torts adopted a principle of 'no liability without fault' the inherent social policy of protecting the interest of the injur d was no neglected. If the purpose of law had been to change the social policy a subjective view of negligence would have been adopted by law. But on the other hand the fault of the defendent was adjudged on an objective view thus retaining the essential purpose of tort law. Even otherwise the new principle adopted was subject to the rule 'res ipsa loquitur' which was a principle to protect the interest of the victim. Besides, if the actual tortfeasor was incapable of fully compensating his superior was made to answer. The liability of the master is not based on his fault, it is based on his relationship with the tortfeasor.

Writers have differed on the theoratical basis of vicarious liability. For example Holmes finds the explanation in the 'formula of identity'(24). Pothier relies upon the maxim 'qui facit per alium facit per se' and holds that it would make the master more careful in his selection of servant. Baty seems to be more near the truth when he says that there ought to be someone capable of responding in damages for the injuries caused (25). Nevertheless tha scope of vicarious liability has been constantly widening (26). Legislatures donot generally lay down theories so that no statutory provision can be cited in favour of this or that theory. But the specific situations and the areas where statutes have provided for vicarious liability of the master do indicate trends. Two basic trends that are discernible are - (a) One who engages in a potentially dangerous enterprise should be held vicariously liable for injuries caused by his employees in the operation of that enterprise, (b) Vicarious liability should lie where it can be easily spread over a wide area. In my submission here lies the ethical justification not only of the law of torts in general but also for the responsibility of State for the torts commited by its servants in particular.

So long the purpose of law of torts was though to be two fold, for the reasons of its history, viz., to compensate the injured, and to admonish the injurer, it was alright only to shift the loss from the innocent to the wrongdoer. But in the present urbanised industrial society the position is

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(24) 4 H.L.R., 345.
(25) Baty, Vicarious Liability, p.154.
(26) 45 H.L.R., 171 for a detailed discussion.

entirely changed(27). The purpose of law cannot be to deter from all types of hazardous activity. There are many activities which are lawful, which are beneficial and which are necessary for the progress of society and therefore which must be not only supported but encouraged, yet they may be the cause of creating risk of injury to the innocent. The solution therefore is to prevent the preventable accident and when the accident does occur, to allocte the loss in a way that would not hinder a desirable economic activity(28). Master should be liable because in a social distribution of profit and loss, the balance of least disturbance seem thereby best to be achieved(29). Thus the true basis of vicarious liability is a socially desirable expedient.

While a new law of enterprise liability is in the making to relate the liability of the biggest enterprise - the State to the old concepts of law cannot, therefore be welcommed as a solution of the propblem. What the Law Commission has suggested, and the Bill before the Parliament is based on the Crown Proceedings Act, 1947, only relates the liability of the State to the existing old law of vicarious liability which tries to find the fault of one to fix up the liability of the other(30). While the problem is to find remedy for the injured the solution suggested keeps the area of non liability which must exist independent of this law. The distinction between governmental and non-governmental activities may seem very neat on paper, it has proved impossible of consistent, or uniform application and the greatest confusion and conflict is to be found in the cases(31).

In the pre-industrial society it might have sufficed to provide justice to the injured by creating fictions or applying varying maxims. In the present day society it is no more possible to solve the problem unless a conscious effort is made to find a rationale of the law of compensation to the injured. Tort law beginning from rudimentay stict liabilities in due course developed into a general liability for negligence and is now on the way to a law of compensation and loss distribution. The true rationale, therefore, is that liability arises for exposing the community to risk, and no casuation of the individual harm(32).

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(27) Stages of industrial development may vary from one community to another but there is uniformity in the nature of the age.
(28) Hasan, S.M. Socio-Economic Revaluation of Tort Law, 3.
(29) Batt, The Law of Master and Servant, 330; 23 Col. L.R.4.
(30) 29 H.L.R., 708.
(31) Harper, Law of Torts, 659(vol.I).
(32) Albert A. Ehrenzweig, Negligence without Fault.

There is no denying that our legal system and much of our law is derived and is based on English law and system. But it doesnot necessarily follow that we must continue to rely on that source alone for guidance for the purpose of rationalisation of our laws. In fact this need is arisen because we have so far banked on it a little too much. It is now desirable to look out and study some other systems also. For example for the views of German and French jurists are more in line with the nees of the modern conditions(33).

To bring the State at par with the private person for tort liability excepting out the sovereign and delegated sovereign acts is not enough for two reasons. Firstly, the excepted areas are wide enough to deprive the citizen of any remedy. Secondly, the basis of State liability according to the German jurist Sundheim is the fact that the State places its officers in such relationships to its citizens as to make it possible for those officers to apply State power against the latter injuriously(34). Therefore the State cannot be allowed to deny liability on the ground that the statute has conferred power on the specific authority. The citizen is not free to deal or refuse with the State, he has to obey and submit, and therefore the State must insure for the rightful and careful conduct of the State servant.

Similarly there is a force of reason and logic in the French view that there is a distinction between the personal fault of the officer and the faulty functioning of the administrative machinery itself(35). Either way the State becomes liable for the injuries caused to the citizen according to this view. If it is the fault of the officer the State is liable vicariously, but if the officer injure the citizen while acting under delegated sovereignty the State is liable for the faulty functioning of the administration itself.

There must necessarily be loss and expense involved in the functioning of the administration and the allied agencies and that is borne of course by the community. There is therefore no reason why the loss or damage caused to the citizens in the course of such functioning should also not be included in the cost of administration and 'carried by the society rather than the unfortunate individual when the loss accidentally happens to fall' upon him.

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(33) Stress on English language alone as a window to the world of all knowledge has also been a contributing cause for our ties exclusively with English law.

(34) 9 Law & Contemporary Problems, 200.

(35) ibid, 208.

Concluding I have only two submissions to make. One - The doctrine of sovereignty as a reason for non-responsibility in any area shall have to be given up not only for justice but also for bringing law in consonance with the social needs. Two - Since fault is inseparable from public functioning of the servant of the State, the whole notion of fault of the servant as necessary condition to fix vicarious liability of State shall also have to be given up.
